Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

(4)

No. 09-377

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 09-377

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The court of appeals held that the two sitting members of the five-member National Labor Relations Board (Board) may not exercise the powers that were properly delegated to them as part of a three-member group. That holding is contrary to 29 U.S.C. 153(b), which provides that the Board may delegate "any or all" of its powers to a three-member group, and that "two members shall constitute a quorum" of such a group.

The court of appeals' decision conflicts with decisions of three other courts of appeals, all of which have held that the remaining two members constitute a valid quorum of the three-member delegee group and may continue to exercise the full Board powers delegated to the group. *New Process Steel, LP* v. *NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. pending, No. 08-1457 (filed May 22, 2009) (*New Process*); *Snell Island SNF*

LLC v. *NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). The certiorari petition was filed in *New Process* (No. 08-1457) prior to the filing of the petition in this case. On the same day the Solicitor General filed the certiorari petition on behalf of the Board in this case, she also filed a response on behalf of the Board in *New Process*, agreeing that the Court should grant the petition in *New Process* to resolve this important issue. The Solicitor General suggested that the Court hold the petition in this case pending resolution of *New Process*.

Respondent Laurel Baye Healthcare of Lake Lanier agrees with the Board that the question presented in this case and in *New Process* is an important and recurring question about which the courts of appeals are divided. Respondent also agrees with the Board that the Court should grant the certiorari petition in *New Process*. Respondent disagrees, however, with the Board's suggestion that the Court hold the petition in this case pending resolution of *New Process*, arguing that respondent should be permitted to defend the judgment below as a full party and describing different analyses employed by the various courts of appeals in the cases addressing the question presented.

From the government's perspective, the most important point is that the Court should resolve the important and recurring issue concerning the validity of actions taken by the two-member quorum of the group to which the Board delegated its powers. The Court could do so by granting the petition in either this case or in *New Process*. The government does not believe, however, that it is necessary for the Court to grant the petitions

in both cases in order to resolve the issue, any more than it is necessary to grant the two other pending certiorari petitions that also present the same question.

Respondent Laurel Baye Healthcare is correct that the various courts of appeals to have considered this question have relied on somewhat different reasoning in reaching their conclusions. But the ultimate question presented in each case is the same. This Court reviews judgments, not the reasoning behind the judgments, see, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 76 (1990) ("[A]lthough we affirm the Seventh Circuit's judgment * * * , we do not adopt the Seventh Circuit's reasoning."); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted."), and each court of appeals passed judgment on the same issue. If the Court grants certiorari in only one case, the private parties in the other pending cases may participate on the merits as amicus curiae to the same extent any other affected or interested party may.

That said, the government of course does not oppose the granting of its own petition in this case in addition to or in lieu of granting the petition in *New Process*, if the Court concludes that doing so would facilitate its consideration of the question presented.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of *New Process Steel, LP* v. *NLRB*, No. 08-1457 (filed May 22, 2009), and then should be disposed of accordingly. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

OCTOBER 2009